

F. PETER ZOCH

IBLA 80-381

Decided November 24, 1981

Appeal from decision of the New Mexico State Office, Bureau of Land Management, requiring additional information as a prerequisite to issuance of oil and gas lease NM-39001, and denying a request for an extension of time.

Extension denial reversed and case remanded.

1. Oil and Gas Leases: First-Qualified Applicant -- Rules of Practice: Generally

Where a decision of a BLM state office requires a priority applicant for an oil and gas lease being issued through the simultaneous filing system to file supplemental information within a specified period of time, and the information is filed after this period has run, then delay in filing may not be waived pursuant to 43 CFR 1821.2-2(g), because the rights of applicants drawn with a subsidiary priority have intervened.

2. Bureau of Land Management

Each request for an extension of time to file a document must be carefully considered on its own merits, with due regard for and consideration of the rights of the parties involved.

APPEARANCES: Craig R. Carver, Esq., Denver, Colorado, and Jason R. Warren, Esq., Washington, D.C., for appellant; Gayle E. Manges, Esq., for the Bureau of Land Management.

## OPINION BY ADMINISTRATIVE JUDGE BURSKI

Appellant's simultaneous oil and gas lease drawing entry card was drawn with first priority in a drawing held for parcel NM 1 on November 14, 1979, in the New Mexico State Office, Bureau of Land Management (BLM). Subsequent thereto, the New Mexico State Office, by decision of December 18, 1979, requested additional information from appellant concerning the formulation of his offer as a prerequisite to the issuance of the lease. Inasmuch as the address on the drawing entry card was that of Stewart Capital Corporation, and the State Office decision was sent with restricted delivery to addressee only, Stewart Capital was required to forward the decision to appellant who received it on January 4, 1980.

By letter of January 18, 1980, appellant, through his attorney, requested an extension of time to February 15, 1980, in which to file the submissions. This request was received in the State Office on January 22, 1980. The Chief, Oil and Gas Section, responded on January 24, 1980. Because of its relevance, we set forth the body of the response in toto:

In reply to your January 18, 1980 letter regarding NM 39001 it has been determined by this office that thirty days is sufficient time within which all offerors can comply with our decision. To grant an extension to your clients gives him/her an unfair advantage over other offerors who file the information timely.

Your requesting additional time for your clients is no longer an isolated case. It has become a regular pattern for your firm to request additional time whenever a parcel is drawn with the address of 115 South Lasalle - Room 2435, Chicago, Illinois 60603 or 100 South Wacker Drive, Room 202, Chicago, Illinois 60606. Your request for additional time for this offer is only the current one in progress. In the past we have received others.

Apparently your firm is the only one having trouble not being able to comply timely with our Decisions.

Mr. Peter F. Zoch received the decision on January 4, 1980, therefore having until February 5, 1980 to complete and have the information in this office. If compliance is not made by the above mentioned date, the offer will be considered rejected and the case will be closed.

Upon receipt of the above missive, appellant's attorney filed a notice of appeal both from the original decision of December 18, 1979, as well as the letter of January 24, 1980. This appeal was received in the State Office on February 1, 1980. Prior to transmittal of the case file, appellant's submission was received on February 5, 1980.

In his statement of reasons in support of the appeal, appellant does not challenge the authority of the Department to request additional information. Rather, the entire thrust of the statement of reasons is directed toward the refusal of the State Office to grant the requested extension of time, arguing that "this form of petty harassment" should not be tolerated. Appellant argued that "given the fact that the New Mexico State Office commonly takes many months in which to process these applications, it cannot be contended that this request of an additional ten days could possibly prejudice any other person or interrupt the normal handling of papers by the New Mexico State Office."

On May 27, 1980, the Field Solicitor, Santa Fe, filed a reply on behalf of the New Mexico State Office. Noting that "the additional evidence was received on February 5, 1980, and was timely filed," the Field Solicitor argued that the appeal should be dismissed and the case files remanded for issuance of the lease to appellant. The Field Solicitor characterized the appeal as "a blatant attempt to intimidate" employees throughout the Department.

In response, appellant's attorneys noted that apparently the letter of January 24, 1980, constituted a 1-day extension of time (a point to which we will return later), and while not opposing the remand request, sought to have this Board address the failure of the State Office to grant the extension for which they had originally asked.

[1] There is an obvious problem with the request for remand, a problem to which both the Field Solicitor and appellant adverted. Filing on February 5 is not filing within 30 days of January 4. February 5, which fell on a Tuesday in 1980, is the thirty-second day after January 4. Appellant and the Field Solicitor characterized this as an apparent 1-day extension of time. In actuality, this would be a 2-day extension. 1/

In any event, it is clear from the State Office's letter of January 24 that there was no intention to grant the extension of time. The utilization of the February 5 date was the result of a simple miscalculation on the part of the State Office. It is true, of course, that 43 CFR 1821.2-2(g) permits the consideration of late filings in certain circumstances, but such consideration cannot occur where "the rights of a third party or parties have intervened." 43 CFR 1821.2-2(g)(2). We do not believe that late compliance with proper requests for information can be excused in the simultaneous oil and gas leasing system.

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1/ While filing on Feb. 4, 1980, would have been timely, this is only so because Feb. 3, the 30th day after receipt, was a Sunday. See 43 CFR 1821.2-2(e). Any extension of time, however, relates to the actual date that a filing would have been required. Thus, a 1-day extension of time would merely have permitted a filing on Feb. 4, without recourse to the provisions of 43 CFR 1821.2-2(e).

As the Board has long noted, the nature of the simultaneous oil and gas lease system is such that failure to comply timely with regulatory provisions cannot be cured by subsequent submissions. This is so because the rights of those drawn with subsidiary priority intervene to prevent acceptance of such supplemental filings on a nunc pro tunc basis. See, e.g., Ballard E. Spencer Trust, Inc., 18 IBLA 25 (1974), aff'd, Ballard E. Spencer Trust, Inc. v. Morton, 544 F.2d 1067 (10th Cir. 1976).

So too, the submission of the advance rental payment after the 15 days provided by 43 CFR 3112.4-1 (1979) (now 30 days under 43 CFR 3112.4-1(a) (1980)), resulted in automatic disqualification of the offeror, and could not be accepted. See Susan Dawson, 35 IBLA 123 (1978), aff'd, Dawson v. Andrus, 612 F.2d 1280 (10th Cir. 1980); Robert D. Nininger, 16 IBLA 200 (1974), aff'd, Nininger v. Morton, Civ. No. 74-1246 (D.D.C. Mar. 25, 1975).

The State Office decision of December 18, 1979, clearly informed the appellant that "[i]n the event of noncompliance with this decision within the time allowed, this offer to lease application will be considered finally rejected and closed." (Emphasis added.) The authority of BLM to request such supplemental information as was sought cannot be gainsaid. See Lee S. Bielski, 39 IBLA 211, 86 I.D. 80 (1979). The effect of the instant decision was such that upon the passage of the last day in which the filing could be made, the priority right of the number two offeror vested and would serve to forestall utilization of the remedial provisions of 43 CFR 1821.2-2(g). Thus, absent a finding by this Board that the State Office had, albeit inadvertently, extended the time for filing, the submission of the information on February 5, 1980, would not be timely.

It must be noted, however, that appellant filed a notice of appeal within the period set for compliance. The effect of this notice of appeal, as we have pointed out in the past, is to suspend the running of the 30 days and, after decision by this Board, the time period commences again and the appellant has 30 days to comply. See Mobil Oil Corp., 35 IBLA 375, 85 I.D. 225 (1978). Thus, inasmuch as appellant's submission is now part of the case record, the delay in filing (even if we deem it such) would not be fatal.

This analysis, however, does not deal with the real gravamen of appellant's complaint. The question which appellant raises relates to the propriety of the refusal by the State Office to extend the time for compliance. The Field Solicitor, for his part, reiterates the argument of the State Office noting that "[t]he Bureau had extended the period to file additional evidence to appellant's attorney on at least five previous occasions. This appeal apparently is solely to require that extensions be granted, at appellant's request or demand."

It is obvious that even the Field Solicitor agrees that the State Office had the authority to grant an extension. Indeed, there is no

statute or regulation which would deny it this authority. What is less clear is whether it is being contended that the mere fact of prior requests in different cases justifies denial of a request in a subsequent case. Such an approach to the question of granting an extension of time, we believe, is inherently arbitrary, capricious, and an abuse of discretion.

This Board has a 30-day time limit for the filing of both statements of reason in support of an appeal (43 CFR 4.412) or an answer to such statement (43 CFR 4.414). Many parties, not least the Solicitor's Office, have seen fit to request extensions. Were the Board to adopt the position seemingly advocated by the State Office, it is fair to say that not a single extension would be granted to the Office of the Solicitor, for its "quota" would have been used up in the distant past. Such an approach, however, would scarcely constitute reasonable adjudication.

In deciding whether to grant or deny a requested extension a number of factors are properly considered. High among such considerations is fairness to the parties. This is not to say that every request must be granted. Clearly, where a statute or regulation does not permit an extension it is beyond the authority of the State Office to grant one. Then, too, there may be a limited number of cases where considerations of public policy and the rights of others necessitate a denial. But what cannot be controverted is the principle that each such request must be examined on its merits.

Appellant timely requested an extension of, in effect, 12 days. We fail to see how such an extension, given the facts of this case, would have impinged upon the sound and efficient running of the State Office, particularly since a failure to obtain an extension could have resulted in rejection of appellant's offer, regardless of any substantive defect. Moreover, the considerations which were actually addressed in the denial relating to past practices of appellant's attorneys are totally irrelevant to a determination of whether, in this specific case, an extension should be granted. We hold, therefore, that the failure to grant the requested extension of time was arbitrary, capricious, and an abuse of discretion. For this reason, without examining whether BLM had actually extended the time through its inadvertent miscalculation, we remand the case for substantive consideration.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the denial of the extension of time is reversed, and the case files are remanded for appropriate adjudication.

James L. Burski  
Administrative Judge

## ADMINISTRATIVE JUDGE LEWIS CONCURRING:

I agree with the result of Administrative Judge Burski but my reasoning is somewhat different.

BLM was performing an administrative function mandated by the Secretary, but not by statute or regulation, in obtaining certain information from filers in simultaneous oil and gas drawings. BLM followed a policy of granting extensions of time in certain instances, including to Stewart Capital Corporation, the address of which was on appellant's drawing entry card. In the present case BLM refused to grant a requested extension, which adversely affected appellant, on the ground that Stewart Capital was requesting too many extensions of time. BLM is compelled to treat all persons or parties in the same situation alike. Although granting an extension of time is discretionary (thus, it is not automatic), fairness to all parties is an absolute requirement. In the future, if BLM wants to change its policy on granting extensions of time, it should notify the public in advance. It could, if it wanted, refuse all extensions of time, it seems to me, in situations such as the present. However, that must be announced and consistently followed.

In the present case, although Stewart Capital may have abused the privilege, there is no reason to think an extension of time had been requested more than once for appellant. I agree that BLM erred in the present case and I find that the decision below should be reversed and the case remanded for BLM to grant the requested extension of time, and further, appropriately, to process the case.

Anne Poindexter Lewis  
Administrative Judge

## ADMINISTRATIVE JUDGE STUEBING DISSENTING:

This appeal is premature, and should be summarily dismissed without prejudice and returned to the New Mexico State Office for initial adjudication. The subject oil and gas lease offer has never been adjudicated in the State office because the process was interdicted by the filing of this appeal. Unless and until BLM rejects the offer, the offeror has not been adversely affected in any way that would entitle him to invoke the appellate process. See 43 CFR 4.410.

By his decision dated December 18, 1979, the Chief, Oil and Gas Section, called upon the offeror, Peter F. Zoch, to submit additional evidence in support of his application. Although the notice of appeal states that this decision (as well as the letter of January 24, 1980) is the subject of the appeal, appellant has not taken issue with that decision in any respect and, in fact, has acknowledged that the appeal is not concerned with the propriety of that decision, saying:

[T]his appeal does not, therefore, challenge the right of the BLM to request and receive additional information which it deems appropriate.

Rather, the essence of this appeal is whether [the Chief] can, arbitrarily and capriciously, refuse to grant Mr. Zoch's legitimate request for a brief extension of time, apparently on the ground that Mr. Zoch has retained the services of both this law firm and Stewart.

The sole focus of this appeal is on the right of the Chief to deny the requested extension of time for the reasons stated in his letter of January 24, 1980, which was not addressed to the appellant but to the attorney who represented the filing service, Stewart Capital Corporation. Apparently Mr. Zoch, in total ignorance of that letter, was proceeding independently to compile and submit the evidence called for by the decision, which evidence was received by BLM on February 5, 1980, the date specified in the Chief's letter. It thus appears that the nominal appellant in this case, Peter F. Zoch, was completely unaware of the letter and has not been adversely affected by it, at least so far.

The real appellant in this case is Stewart Capital Corporation, which is concerned solely with the Chief's behavior and attitude toward itself and its clientele. This is made abundantly clear in one of its pleadings, as follows:

Appellant [Zoch?] is, of course, pleased to learn that his good faith efforts to comply with the New Mexico State Office's administrative procedure were successful.

We [Stewart?] are distressed, however, that counsel for the Bureau should conclude this appeal is a mere "blatant attempt to intimidate . . . [the Chief and] other Bureau or Departmental employees." Reply to Appeal of F. Peter Zoch, III at page 3. This firm [the law firm?] is not in practice to launch frivolous harassment campaigns against any governmental employee. It is to our firm's advantage to maintain friendly working relationships with those agency employees, such as [the Chief], with whom we have repeated contact. Our sole reason in taking an appeal from [the Chief's] denial of our request for an extension of time was to preserve the rights of our clients, while simultaneously making every good faith effort to comply with what has now been interpreted as a February 5th deadline. [Emphasis added.]

Stewart Capital Corporation has no standing to appeal in this instance. According to Zoch, and its own assertions, it has no interest in the subject lease offer. Moreover, by filing this appeal and thereby preventing the adjudicatory process from going forward in the New Mexico State Office without waiting to learn whether BLM would issue the lease, Stewart has hardly acted in Zoch's interest, as a year-long delay has resulted. The appeal is from an interlocutory procedural requirement which did not adversely affect the nominal "appellant," and this Board does not ordinarily consider interlocutory appeals. Marathon Oil Co., 43 IBLA 309 (1979); Elko County Board of Supervisors, 29 IBLA 220 (1977). See 43 CFR 4.28.

The "appeal" is nothing more than a letter of complaint against the conduct and orientation of a BLM employee, coupled with a request that this Board provide instructions and "guidelines" to remedy the situation. The statement of reasons accuses the employee, among other things, of a general bias against Stewart Capital Corporation manifested by arbitrary and capricious action and possible trickery and petty harassment to thwart the efforts of Stewart Capital clients generally to obtain leases.

This Board should not entertain complaints directed against the attitude and behavior of BLM personnel simply because they are presented in the guise of an "appeal" in a matter in which no initial decision has been made. The statement of reasons says:

It is going to become necessary at some point to put a stop to this form of nonsense. Appellants [now suddenly plural] would suggest that this should remain an internal matter of discipline for the Department, to be handled by the BLM line authorities, the Solicitor, or the IBLA.

The Board of Land Appeals is an independent, quasi-judicial tribunal which does not exercise supervisory authority over BLM personnel.



Such complaints as "appellants" desire to make would be more appropriately addressed to an officer with direct supervisory responsibility for the employee and his function.

Edward W. Stuebing  
Administrative Judge

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